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Establishing Administrative Judiciary in the Republic of Macedonia: Ideas and Prospects

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1. INTRODUCTION

One of the basic activities of the public service is resolving administrative disputes. That means adopting of individual administrative acts (decisions) which resolve the issues connected with the citizens' rights, duties and their legal interests. In that way the so-called administrative-legal relations between the administration and it's clients is created. Due to the fact that these relations are part of the citizens' everyday life (from the moment of birth until the moment of death every man is getting in contact with different types of administrative bodies) it is very often the case that as a party citizens are dissatisfied by the actions or the acts of the administration.

In the Macedonian legal system different mechanisms for the protection of the (un)desired mistakes done by the bodies of the public service are anticipated. The most important are:

1. The right to appeal as a regular legal remedy which raise internal control by a higher administrative authority over a concrete decision made by a lower administrative body. So, we are talking about a process of protection of the party involved, by conduction of control over concrete administrative acts, which is done inside, within the administration.

2. The right to bring a charge that raise an administrative dispute. This measure is providing an administrative-judiciary protection over the legality of the acts and the actions of the administrative bodies. So, the party dissatisfied from the result of the appeal action has the right to deny the decision made by the second grade administrative body by bringing a charge in the Supreme Court of the Republic of Macedonia. Unlike the previous type of control, the case here is external control because it is being conducted by a body which isn`t a part of the executive branch.

3. There is another type of external control over the public administration and that is the one which is conducted by the institution-Ombudsman. The action is raised on personal initiative of the Ombudsman or after the complain of the dissatisfied citizens. This type of control is not connected with any formalities whatsoever and is cheaper then that judiciary control

These three types of control over the public service which provide the protection of the individual rights of the citizens find their legal bases in the Constitution of the Republic of Macedonia and are regulated by different acts of Law: The General Administrative Procedure Act, Law on administrative disputes and the Law on Public Attoreney (Ombudsman). Each of these legal acts, including the Constitution, have to be reviewed and suffer some smaller or larger changes in direction of enhancing the legal position of the citizen and enclosing to the standards of the European law.

2. PROBLEM DESCRIPTION

2.1. *Appeal as a legal remedy in the administrative procedure*

The right to appeal against the individual acts of the administrative authorities is a Constitutional right (article15 of the Constitution of the Republic of Macedonia). That is strictly respected when it comes to lower authorities of the public administration, in fact for the authorities that are within the ministries. In that case a second degree

authority which decides for the appeal of the party is the ministry in charge of the control of the certain administrative organ.

The inconsistency, which is obvious at this kind of a constitutional solutions, is in cases when the first degree act is adopted by the highest authority of the state administration, especially in cases when the act is adopted by a state body independent of the executive authority. Those are the institutions established by the Assembly and not by the Government of the Republic of Macedonia: Antimonopoly Administration, National Bank, Agency for Public Servants, Directorate for personal data protection etc.

By a rule, for the appeal should decide a higher authority then the appellant (devolution of the appeal). But, in the above-mentioned cases there aren`t higher authorities which would be in charge for the conducting of the control over the legality of the individual acts issued by the particular body against which the complain has been submitted. So the question is: How to conduct the constitutional regulation and to assure the right to appeal and at the same time to respect the appeal's devolution as a legal remedy?

By the adoption of the Law for local self-government, lots of administrative legal subjects are under the jurisdiction of the municipalities, for instance the City of Skopje as unit of the local self-government. An appeal against the acts of the municipality administration is allowed and the Mayor decides upon. On the other hand, the mayors are political figures, persons proposed mostly by the political parties and elected on free elections.

This solution in fact means an introduction of a political element in the resolving of the administrative disputes. There is no guarantee, neither a necessity and an obligation for the Mayor to be a lawyer. But anyway, he/she is in charge for carrying out the administrative procedure and solving the second grade appeals submitted by the citizens.

2.2. Ombudsman Institution

The Law on Ombudsman from the year 2003 has significantly enhanced the position and the jurisdictions of the Macedonian Ombudsman, unlike the previous law from 1997. Part of the solutions are good and expected and they are compatible with the legal solutions anticipated in the western European democracies. But, in the Republic of Macedonia was made even a step forward which is under a reasonable doubt concerning the maturity of the current social conditions.

So, the Macedonian ombudsman has the right to act against the courts services in the field of unexcused and illegal prolongation of the procedure. In the practice, this law regulation, consciously or not, by the office of the Ombudsman is interpreted as his possibility to control the action, in fact the competence of the judges themselves. This interpretation of the legal regulation is wrong, and can even harm, in the first place because the image of the Ombudsman who has to be one of the most eminent lawyers in his country doesn`t allow ignorance, misunderstandings or inappropriate interpretation of the legal letter. Furthermore, as much as it represents a product of democracy, as much as it is opened to the citizens, the institution Ombudsman is not in charge of conducting control over the actions of the judges. In that way, it becomes a lengthened hand of the administration in her intention to dominate above the two other parts of the state power.

The next problem connected with this institution is the legal solution that anticipates the right of the Ombudsman to suspend an individual act of the administration body. If we observe the problem only superficially, this is a good solution because it represents

enlarging the institution's jurisdiction. But, theoretically and practically observed, it is really the other way around. The Ombudsman is not the citizens' attorney, he is a mediator between them and the administration. The Ombudsman is at the same time an educator of the servants that helps them to acknowledge and overcome their own mistakes in their actions. By the jurisdiction to take over some repressive measures this institution will only alienate from the administration and will get a role of supervisor who will watch and wait for its mistakes. The exaggerated use of suspension of individual acts of the administration could lead to serious blockade of her actions.

2.3 *Administrative dispute*

The Constitution of the Republic of Macedonia guarantees the court protection of the legality of the state administration's acts. The court control over the administrative acts is being conducted through the administrative dispute.

According the Law on administrative disputes, and administrative dispute can be lead only against an individual administrative acts.

An administrative dispute can`t be lead: against acts concerning affairs for which a court protection is provided out of the administrative dispute; against acts connected with affairs for which according to special regulation of special law an administrative dispute can`t be lead; and in affairs for which according the constitutional rights is in charge the President of the Republic of Macedonia.

The administrative disputes are under the jurisdiction of the Supreme Court of the Republic of Macedonia. According article 101 from the Constitution of the Republic of Macedonia that is the highest court in the Republic which assures unity in the application of the laws by the courts. The Supreme Court of Law is conducting the court authority over the whole territory of the Republic of Macedonia. It consist of 25 judges from whom a President of the Court is elected with a mandatory of 4 years and a possibility to be reelected for the same function. For the election of the president is in charge the Assembly of the Republic of Macedonia, the Supreme Court has Secretary general, three court sections (section for criminal law, section for civil law, section for administrative disputes), informatics center, evidention of court practice and education of expert service . The Supreme Court of Law is at this moment the only court in the Republic that decides in the first (consisted of three judges) and second degree (consisted of five judges) for the administrative disputes.

Deciding for the law sue for an administrative dispute the Supreme Court of Law can deny an administrative act against which an administrative dispute has been raised –an dispute for the legality of the act after what the case is being returned to the administrative authority in charge. Besides this kind of administrative disputes there are so called disputes of full jurisdiction when the Supreme Court of Law is no longer the one that decides only for the formal and material legality of the administration act but as well can, if the nature of the affair allows it, to resolve with a verdict the disputable administration affair. The verdict in this case is a total replacement of the administration act.

According the statistics analyzed by the Ministry of justice for the period 1997-2003, the undisputable conclusion is that the Supreme Court of Law is facing a problem of lagging behind of cases that is questioning the efficiency and the effectiveness of the court procedures. Having insight all these data it can be recognized that the lagging behind of the Supreme Court of Law is exclusively connected to the administrative disputes. Namely, in 1997 of all the 5454 cases that weren`t closed, 3751 were administrative disputes; in 1998- 6001(3.628); in 1999- 5.697(3.195); in 2000-5.211(

2.985) in2001- 4.075(2.561) in 2002- 4.173(3.081) and in 2003-4.615(4.075). The conclusion that the Supreme Court of Law is inefficient in dealing with administrative disputes is more then obvious.

3. POLICY OPTIONS

3.1 The problem with the right to appeal

Full realization of the right to appeal against first instance decision of highest state body could and must exist. It is precondition so Republic of Macedonia joins the family of states that provide for the Rule of Law and create real conditions for democratic protection of the rights and the liberties of the citizens. In that purpose, several solutions are foreseen:

First option: Deciding authority on the appeal against the first instance decisions of the independent state bodies, to be Commission with the Government of the Republic of Macedonia, consisted of experts in the relevant field, proposed by the head of the body – Minister, Director etc.

NB: *Strengths* – full implementation of the Article 15 of the Constitution of the Republic of Macedonia that guarantees the right to appeal to the individual acts of all bodies of the state administration and the organizations with public authorizations; respect and devolutivity of the appeal as regular legal remedy, meaning that upon the appeal decision is made by higher body that the one that brought the first instance act; relatively inexpensive procedure.

Weaknesses – the independence of such Commissions could be disputed. Most of them are comprised of officials of the body that brought the first instance act, proposed for the position by the Head of body they are employees of. In such circumstances, it is merely impossible to believe that any of this officials would oppose to the possible political or personal interests of the superior that proposed them for members in first place; brining the independent and autonomous state bodies under the control of the executive power. By this the sole purpose of their existence is lost. Namely, the independent state bodies, deliver specific decisions that impose duties to the state bodies, when that is in the interest of the individual rights of the citizens. In such cases it is beyond imagination such decisions to be reviewed by Government Commissions, especially when the Body brought decision that is not in the interest of the administration and the executive power in whole. The doubts on the impartiality and objectivity is even bigger then the previous case.

Second option: the appeal procedure to the lead and upon the appeals decision to be made by special expert commissions like arbitration. The commission would be comprised of experts in the relevant field, elected by the Assembly of the republic of Macedonia upon proposal of the Commission for Elections and Appointments of the Assembly. The same principle would be applies in the appeal procedures against the Ministers, as highest bodies of the state administration, given that in this case the proposal should come for the Government's Commission for Elections and Appointments.

NB: *Strengths* – secured independence against the political influences and pressures; higher expertise of the members of the Commission, and by that higher quality of the decisions.

Weaknesses – need for additional funds for the Budget, for meeting the needs of the experts. Such commissions are quite costly.

Third option: amending Article 15 of the Constitution of RM, which stipulates the right to appeal against the individual acts of the state bodies, by foreseeing the possibility also to use other legal remedy. This would provide, in cases when appeal cannot be filed due to nonexistence of higher body that would decide upon it, to file law suit that is also regular legal remedy, which would initiate administrative dispute.

NB: *strengths* – direct court protection of citizens' rights is provided where the appeal is impossible and unusable. The citizens, as well as the state bodies, shall not be obliged to respect the declarative right to appeal against the acts of the high state bodies, for which realization hybrids solutions such as the permanent Government commissions are usually found.

Weaknesses – none.

3.2. The problem with the institution Ombudsman

A) Jurisdiction of the Ombudsman

The Institution Ombudsman is achievement of the democracy and represents serious mechanism for protection of the legality and the rights and freedoms of the citizens. It is often said that the Ombudsman fulfills its role and tasks even when it does not work anything – with its existence. This means that the public administration is aware of its existence and from those reasons tries to improve its work, and especially the relation with its clients – the citizens. On the other hand, any attempt the Ombudsman to take repressive measures towards the administration, and even more towards the judiciary, leads to its transformation into the lawyer of the citizens, by which the essence of its existence is lost.

The relatively new institution Ombudsman in the Republic of Macedonia, should justify its existence to the citizens, but also to the administration. This should be taken into account while undertaking any activity leading to redefinition authority and jurisdiction of the Ombudsman, as well as whether or not societal conditions for such redefined authorizations have been created. The New Law on Public Attorney (Ombudsman) from 2003, foresees authorizations uncommon for this institution even for countries with longer traditions of its existence.

First option: To maintain the existing legal stipulation by which the Ombudsman is authorized to control the court/judiciary services for the prolongs of the court procedures.

NB: *strengths* – one of the biggest problems in the Macedonian judiciary that also represent serious breach of the citizens rights – the length of the procedure is accented.

Weaknesses – opening to the possibility for (un)intended misinterpretation of the term "court services" that could be extended to the judges as well. This would jeopardize the independence of the judges, as well as the principle that only the republican Judiciary Council has authority to control the professional and ethical work of the judges. The current practice shows examples of such excessive interpretation of this legal provision by the current Macedonian Ombudsman, who publicly in all media criticized the work of three judges and called on their responsibility. This behavior could continue as sort of publicity measure for strengthening the Ombudsman's position and image between the citizens, however it harms the judiciary and the public administration.

Second option: To stipulate clearly that the judges exempt of the Ombudsman's jurisdiction.

NB: *strengths* – full respect of the principle of the independence of the judiciary. Ombudsman's jurisdiction over the work of the judiciary is stipulated only in two European countries, those with longest tradition of functioning of this institution – Sweden and Norway. It is absolutely unnecessary and pointless to have such solution the Republic of Macedonia in the current moment. Further on, considering the fact that the employees of the court services have status of civil servants (unlike the judges), and the Ombudsman's control spreads over the civil servants, having legal provision that highlights the Ombudsman's jurisdiction over this services is excessive. If, however, proves to be necessary, it will be good if the judges are clearly exempt from the Jurisdiction of the Ombudsman.

Weaknesses – none

B) Authorizations of the Ombudsman

Basic characteristic of the Ombudsman's authorizations is non-repressiveness. Namely the Ombudsman, anywhere in the world, can give recommendations, suggestions, opinions and to propose new legal solutions. As only mean of repression, in isolated cases is to publicize the name of the civil servant that misused his/her authorizations or did not act upon the recommendations of the Ombudsman. At the end of each calendar year, the Ombudsman submits Report on their work to the legislative body (in some countries to the Head of the State as well), in which Report it states their remarks upon the work of some bodies of the public administration. If there are serious critics on the work of that body, the Parliament may call upon that report and cut the budget of the respective body. In the Republic of Macedonia, the Law on Public Attorney of 2003 provides the opportunity the Ombudsman to suspend act of the administrative body until second instance body decision i.e. court decision is delivered. This is clear example for contravening of the basic characteristic of the Ombudsman's function.

First option: To keep the existing legal provision

NB: *Strengths* – none.

Weaknesses – the work of the administrative bodies is blocked and the Ombudsman is given authorizations that are out of any definition of the institution Ombudsman. Example: stopping the execution of (suspension) of an act brought by first instance body. The Law provides the act to be suspended till delivery of second instance decision. What if the party that requested suspension of the act, after the suspension os done by the Ombudsman, does not appeal against the act? How long the suspension will stand? Does this mean indirect annul of the act by the Ombudsman, which has been consciously extricated by the discontented party? Even bigger mistake could be done in two-partied cases (when there are two opposing parties in the case). The suspension of the execution in two-partied cases, could lead to satisfaction of the party that filed a complaint to the Ombudsman, but in the same time this infringes the rights of the other party!

Second option: to annul the legal provision that provides the Ombudsman the right to stop the execution of an act of the public administration.

NB: *Strengths* – cancellation of the possibility the citizens to misuse authorizations of the Ombudsman, as well as undisturbed functioning of the administration. The only

body that can forbid execution of the act is the second instance body i.e. the court in administrative disputes when second instance body decisions are in question.

Weakness – none

3.3. The problem with the Administrative Dispute

The law suit is regular legal mean by which administrative dispute is initiated against final acts of the bodies of the public administration. In the Republic of Macedonia the administrative disputes are proceeded with the Supreme Court of the Republic of Macedonia.

First option: to keep the existing solution.

NB: *Strengths* – none! In the prior part, where the problem has been described, statistical data on the efficiency of the Supreme Court in resolving administrative disputes has been provided. These data are defeating.

In interviews carried out with Supreme Court judges that work or have been working on administrative disputes, find that the Supreme Court should be exempt. The president of all Appeal Courts and Basic Courts in Skopje share this opinion. The President of the Constitutional Court, the President of the Supreme Court and the President of the Republican Judiciary Council, as well at the scientific public stand in their opinion that the Supreme Court, as highest judiciary body in the country, should not deal with administrative disputes especially not in first instance.

Weaknesses – inefficiency of the Supreme Court and dissatisfaction of the citizens. The court proceedings, in average, last more then two years.

Second option: to decentralize the work of the Supreme Court by transferring the administrative disputes into jurisdiction of the Appeal Courts.

NB: *Strengths* – unburdening of the Supreme Court

Weaknesses – overburdening of the Appeal Courts that in the moment, even without the administrative disputes, reach the upper limit of their workload. Secondly, lack of specialization of the judges. The judges of the Appeal Courts never dealt with administrative law, nor are willing to undertake such duties. Thirdly, the inefficiency of the Supreme Court, due to overload of cases, will be transferred to the Appeal Courts. The end result would again be extremely long and expensive administrative disputes which are not in the interest of the citizens. There are rare supporters of this option among the expert and scientific public.

Third option: establishment of Administrative Court of the Republic of Macedonia

NB: *Strengths* – All of the advantages and the need for administrative judiciary in the republic of Macedonia, have been laid out in the research paper of this project. In brief those are: specialized and knowledgeable judges that will deal exclusively with administrative law; shortening the length of the administrative disputes; getting closer to the European standards; ideal replacement of the appeal against the first instance acts of the highest state bodies would be administrative dispute in front of a specialized court; by establishment of Administrative Court it would be provided for more frequent solving of the cases in full jurisdiction. Namely the court, by delivering verdict that fully replaces the disputed act would solve the case in full, instead of the current practice of having cases for protection of the legality, in which the Supreme Court only

annuls the act and returns the case to administrative body that brought the act in the fist instance. This is leading to situation, in which the parties wait for years for real changes in the factual situation; possibilities for employment of new personnel that would be recruited not only form the current judges and law clerks, but also from: high ranking civil servants that worked in their whole carriers on administrative issues, from the range of attorneys that predominantly have been representing parties in administrative disputes, as well as from prominent scientists in the field of administrative law. As model for establishment of administrative judiciary in the Republic of Macedonia, the practices from the region can be employed, with exception that at the beginning only one court will be established for the whole territory of the country, considering the limited financial resources.

Weaknesses – need for additional finances.

As the last note in this case it is needed to stress that the author of this research is member of the Commission that prepared proposal for Law on Administrative Disputes that fully embeds the third option i.e. establishment of Administrative Court of the Republic of Macedonia. The proposal has been submitted to the Ministry of Justice that is authorized to propose the Law on Administrative Disputes. It is expected the Law to be submitted for review to relevant Government Commissions in near future.